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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN THE MATTER OF THE SUPERVISED )  
ADMINISTRATION OF THE ESTATE )  
OF MARTHA WAKEFIELD, Deceased, )

CINDA BARTLEY, )

Appellant-Intervenor, )

vs. )

THE ESTATE OF MARTHA WAKEFIELD, )

Appellee. )

No. 12A02-0708-CV-685

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APPEAL FROM THE CLINTON CIRCUIT COURT  
The Honorable Linley E. Pearson, Judge  
Cause No. 12C01-0503-ES-26

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**April 9, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## **Case Summary**

Cinda Bartley appeals the denial of her motion to correct error following the trial court's dismissal with prejudice of her claim against the Estate of Martha Wakefield ("the Estate"). We reverse and remand for further proceedings.

## **Issue**

Bartley raises a single issue, which we restate as whether the trial court abused its discretion in denying her motion to correct error.

## **Facts and Procedural History<sup>1</sup>**

On March 3, 2005, Charles Mark, by his attorney Eric H. Burns, filed a petition for probate of will and issuance of letters testamentary for supervised administration of the Estate. On April 15, 2005, the trial court issued an order admitting Wakefield's will to probate and appointing a personal representative to the Estate. Bartley, who claims to be Wakefield's daughter, intervened, and on July 28, 2005, filed a claim against the Estate for \$41,719.86. On December 19, 2005, Burns entered his appearance on behalf of the Estate and filed a petition to recover assets, which the trial court granted on December 27, 2005.

On April 27, 2006, Burns filed a motion to compel Bartley to comply with discovery. The trial court granted the motion, ordering Bartley to comply with discovery requests propounded September 26, 2005, and December 22, 2005. Appellant's App. at 9. On May

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<sup>1</sup> The statement of facts in Bartley's brief is not accompanied by citation to the record. *See* Ind. Appellate Rule 46(A)(6)(a) ("The facts shall be supported by page references to the Record on appeal or Appendix in accordance with Rule 22(C)."). Additionally, the record before us consists of only the chronological case summary ("CCS") and documents dated after August 2006, and therefore there is no support in the record for many of the facts recited in appellant's brief. Accordingly, we have limited our recitation of the facts to those that can be supported by the record before us.

19, 2006, Bartley filed a response to request for production of documents. On May 30, 2006, Burns filed another motion to compel discovery, for sanctions, and request for hearing. The trial court granted the motion, ordering Bartley to comply with discovery requests propounded December 22, 2005, and set a hearing for July 13, 2006. *Id.* at 10.

The hearing on Burns's May 30, 2006, motion was later rescheduled for August 2, 2006. On that day, the trial court issued an order, commanding Bartley to pay Burns "the sum of \$770, for her failure to timely comply with discovery, and for sanctions. Said fees shall be paid to the Clerk of this Court on or before 30 days from the date of this Order." *Id.* at 11. The trial court also ordered Bartley to execute authorizations for release of banking information and release of her credit report to Burns. *Id.*

On September 21, 2006, Burns filed a verified motion for proceedings supplemental to execution, alleging that (1) the August 2, 2006, judgment of \$770 was unpaid, (2) there was no cause to believe that levy of execution against Bartley would satisfy the judgment, (3) Bartley had non-exempt property, income, wages, assets, or profits within the State of Indiana subject to execution, and requesting an order requiring Bartley to appear and answer as to any such non-exempt property that could be applied to satisfy the judgment. *Id.* at 20. Burns's correspondence to the trial court indicates that he also submitted a motion for sanctions. *Id.* at 22.<sup>2</sup> Also on September 21, 2006, without holding a hearing, the trial court issued an order for sanctions, which provided in relevant part,

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Further, Bartley's counsel is directed to Indiana Appellate Rule 46(A)(5), which provides that the statement of the case include page references to the record on appeal or the appendix.

<sup>2</sup> The CCS does not show that a motion for sanctions was filed. Appellant's App. at 11.

Comes now Eric H. Burns, attorney for the Estate of Martha Wakefield, deceased, and files his Motion for Sanctions, which motion is part of the Court's record.

And the Court, having examined said petition and being duly advised, now enters sanctions against [] Cinda Bartley.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Cinda Bartley is in default of this Court's Order of August 2, 2006, whereby default judgment is granted in favor of the Estate of Martha Wakefield for the relief requested in the [E]state's Petition to Recover Assets and that a monetary judgment shall be entered as shown by the evidence at the hearing on damages.

....

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the claim filed by Cinda Bartley in the Estate of Martha Wakefield shall be, and the same is hereby dismissed with prejudice.

*Id.* at 19. This order also set a hearing on damages for October 25, 2006.

On October 23, 2006, Bartley filed a motion to set aside order for dismissal of claim, to reinstate claim, and to continue order for examination. *Id.* at 23. The motion asserts that Bartley was not at fault in failing to respond to the August 2, 2006, order, but that the delay occurred because Bartley was undergoing surgery in Colorado and her counsel's mother fell ill on August 4, 2006, and passed away on August 24, 2006. The motion further stated that Bartley's counsel sent Burns a letter, attached to the motion as Exhibit A, on August 29, 2006, explaining the delay. *Id.* at 27.

On October 25, 2006, the hearing on damages was continued to November 27, 2006. On November 27, 2006, Bartley filed a supplemental motion to set aside order of dismissal of claim and reinstate claim, asserting that a hearing was not held on the matter, that Bartley was not given an opportunity to respond, and that her failure to pay the \$770 was not due to willful refusal but due to her surgery and the death of her counsel's mother. *Id.* at 28. On November 27, 2006, the chronological case summary ("CCS") shows that proceeding

supplemental testimony of Bartley was recorded in the jury room, but does not indicate that any other matters were addressed. *Id.* at 12. Bartley claims that she had no opportunity to argue or present evidence in support of either of her motions to set aside dismissal of claim.

On December 27, 2006, the trial court issued an order denying Bartley's motion to set aside order of dismissal of claim and to reinstate claim. *Id.* at 17. On January 16, 2007, Bartley filed a motion to correct error, which was deemed denied pursuant to Indiana Trial Rule 53.3. Bartley appeals.

### **Discussion and Decision**

Bartley challenges the trial court's denial of her motion to correct error. Typically, we review such a denial for an abuse of discretion. *In re G.R.*, 863 N.E.2d 323, 325 (Ind. Ct. App. 2007). "An abuse of discretion occurs when the trial court's decision is against the logic and effect of the facts and circumstances before the court or if the court has misinterpreted the law." *Id.* at 325-26. Here, the Estate has not filed an appellee's brief.

In such instance, we do not undertake the burden of developing arguments for the appellee, as such duty remains with the appellee. Applying a less stringent standard of review, we may reverse the trial court when the appellant establishes prima facie error. Prima facie is defined as at first sight, on first appearance, or on the face of it. Still, we are obligated to correctly apply the law to the facts in the record in order to determine whether reversal is required.

*Conseco Fin. Servicing Corp. v. Kimberly Mobile Home Park*, 780 N.E.2d 852, 854 (Ind. Ct. App. 2002) (citations and quotation marks omitted). The purpose of this rule is not to benefit the appellant, but to relieve this court of the burden of controverting the arguments advanced for reversal where that burden rests with the appellee. *State Farm Ins. v. Freeman*, 847 N.E.2d 1047, 1048 (Ind. Ct. App. 2006).

Specifically, Bartley asserts that the trial court erred in issuing the September 21, 2006, order, in which it dismissed with prejudice her claim against the Estate, without first holding a hearing on the matter. The basis for the dismissal of Bartley's claim was that Bartley was in default of the August 2, 2006, order, in which she was commanded to pay Burns "the sum of \$770, for her failure to timely comply with discovery, and for sanctions." Appellant's App. at 11. As such, the August 2, 2006, order constituted a money judgment. *See United Farm Bureau Mut. Ins. Co. v. Ira*, 577 N.E.2d 588, 593 (Ind. Ct. App. 1991) (stating that a money judgment must be certain and definite and must name the amount due). Thus, in failing to pay Burns the \$770, Bartley failed to comply with a money judgment. The appropriate remedy when a judgment debtor fails to pay a money judgment is to initiate proceedings supplemental to execution pursuant to Indiana Trial Rule 69(E), the purpose of which is to discover property and reach assets that the judgment debtor has failed or refused to apply in payment of a judgment and which cannot be reached by an ordinary execution. *Union Bank & Trust Co. v. Vandervoort*, 122 Ind. App. 258, 264, 101 N.E.2d 724, 727 (1951). We observe that the Estate appropriately filed a verified motion for proceedings supplemental to execution on September 21, 2006. Because the dismissal of Bartley's claim is not an appropriate remedy for failure to pay a money judgment, the trial court erred in dismissing her claim. We therefore reverse the trial court's dismissal of Bartley's claim against the Estate.

However, the record suggests that Bartley may have committed a violation of a discovery order, in which case the dismissal of her claim may be a proper sanction. Pursuant

to Indiana Trial Rule 37(B), a trial court has the authority to dismiss a litigant's claim as a sanction for failing to comply with a discovery order. The rule provides, in pertinent part,

If a party or an officer, director, or managing agent of a party or an organization ... fails to obey an order to provide or permit discovery, including an order made under subdivision (A) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

...

(c) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party.

“The choice of an appropriate sanction for a discovery violation is a matter committed to the sound discretion of the trial court.” *Bankmark of Fla., Inc. v. Star Fin. Card Servs., Inc.*, 679 N.E.2d 973, 978 (Ind. Ct. App. 1997). “The only limitation on the trial court in determining an appropriate sanction is that the sanction must be just.” *Id.* (citing Ind. Trial Rule 37(B)(2)).

While Trial Rule 37(B) is silent as to whether the trial court must first afford the non-complying litigant a hearing on the matter, we have previously recognized that “when a petition for sanctions, such as a motion to dismiss, is filed, the trial court must ordinarily conduct a hearing thereon to determine whether one of the enumerated reasons for not imposing sanctions exists.” *Pfaffenberger v. Jackson County Reg'l Sewer Dist.*, 785 N.E.2d 1180, 1183 (Ind. Ct. App. 2003) (citing *Hatfield v. Edward J. DeBartolo Corp.*, 676 N.E.2d 395, 400 (Ind. Ct. App. 1997), *trans. denied*); *see also South v. White River Farm Bureau*

*Co-op*, 639 N.E.2d 671, 674 (Ind. App. Ct. 1994), *trans denied*; *Stachurski v. Moore*, 610 N.E.2d 272, 274 (Ind. Ct. App. 1993), *trans. denied*.<sup>3</sup>

Here, we observe that the trial court's September 21, 2006, order refers to a motion for sanctions filed by Burns and states that the motion is part of the trial court's record. In addition, Burns's September 20, 2006, letter to the trial court and Bartley's motion to set aside order of dismissal of claim also acknowledge the existence of this motion for sanctions. Curiously, the CCS does not show that Burns filed a motion for sanctions on September 21, 2006, and there is no copy of such a motion in the record. Because the trial court's order of August 2, 2006, does not specify what sanctions it is imposing other than the imposition of the money judgment and the order of September 21, 2006, bases the dismissal of Bartley's claim on violations of the August 2, 2006, order—an impermissible sanction for failure to pay a money judgment—we conclude that the trial court abused its discretion by dismissing Bartley's claim without a hearing or providing findings of what, if any, discovery violations would support dismissal. Accordingly, we conclude that the trial court abused its discretion in denying Bartley's motion to correct error. We therefore reverse the trial court's denial of

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<sup>3</sup> We acknowledge that we have upheld the dismissal of a litigant's claim as a discovery sanction even though the trial court dismissed the claim without first holding a hearing. *See Hatfield*, 676 N.E.2d at 401 (holding that after plaintiff failed to appear at two properly noticed depositions, trial court did not err in granting motion to dismiss without an oral hearing where plaintiff was given fourteen days to respond to motion and failed to do so); *Pfaffenberger*, 785 N.E.2d 1180, 1186 (holding that where appellants' motion to reconsider and set aside dismissal was granted and appellants failed to respond to discovery requests even after receiving a sixty-day extension of time, dismissal of appellants' claim without holding hearing on second motion to dismiss was proper). *Hatfield* and *Pfaffenberger* are distinguishable from the case at bar. Bartley's conduct is not comparable to the egregious conduct of the litigants in *Hatfield* and *Pfaffenberger*, and Bartley has not received an opportunity to respond to Burns's motion for sanctions. *See Baughman v. State*, 777 N.E.2d 1175, 1177 (Ind. Ct. App. 2002) (declining to uphold trial court's order imposing sanctions where no hearing was held and noting that "the elements of procedural due process required in civil proceedings are not definable with precision, but the opportunity to be heard is fundamental.").

Bartley's motion to correct error and remand with instructions to order a hearing on Burns's motion for sanctions.

Reversed and remanded.

BAILEY, J., and NAJAM, J., concur.